UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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VIOLET FRYER,

Plaintiff,

v. 09 Civ. 9514 (WHP)

OMNICOM MEDIA GROUP, et al.,

Argument

Defendants.

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New York, N.Y.
May 20, 2011
3:15 p.m.

Before:

HON. WILLIAM H. PAULEY

District Judge

APPEARANCES

THOMPSON WIGDOR and GILLY
Attorneys for Plaintiff
BY: KENNETH P. THOMPSON
SCOTT B. GILLY

DAVIS & GILBERT LLP
Attorneys for Defendants
BY: GUY R. COHEN
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GEX|NUMSORT

(Case called)

MR. THOMPSON: Good afternoon, your Honor. Kevin Thompson and Scott Gilly of the law firm Thompson Wigdor and Gilly.

THE COURT: Good afternoon.

MR. COHEN: Good afternoon, your Honor. Guy Cohen and Andrew Keisner, Davis & Gilbert, for the defendants.

THE COURT: Good afternoon, gentlemen. This is the defendant's motions for sanctions. Do you want to be heard?

MR. COHEN: Yes, I do, your Honor. Your Honor, this is a motion for dismissal of the lawsuit and sanctions that OMD has reluctantly brought against Violet Fryer and her lawyers. What the facts show, your Honor, is that by September 17th of last year Ms. Violet Fryer had accepted not one but two jobs, one with Universal McCann UM that she ultimately rescinded, and one with Kraft, which she ultimately took. Each of those jobs provided her with more money and greater salary than she had when she was employed by OMD.

The only reason OMD found out about this, your Honor, was pretty much out of pure luck. About 45 days, a month and a half, after she received that first job, OMD found out from a separate source, not from the plaintiff herself, that she had gotten that job. The reason that OMD had not found this out was because both Violet Fryer and her attorneys had intentionally decided, in concert with another, to keep this

information from OMD in a very clear effort to improve their bargaining position while the parties were discussing settlement.

The misconduct here, your Honor, is not limited to a single issue. It's evidence of a number of different types.

We start with the deposition. Ms. Fryer has attempted to suggest that her deposition was solely a single statement taken out of context. Entirely not so. Any reasonable person who would view the videotape of her deposition would see a stretch of about five minutes where Ms. Fryer was doing nothing other than taking steps to mislead, to avoid showing OMD and their attorneys that in fact she had gotten a new job.

You see her talking about how all the jobs are either too junior or too senior, about how her household requires that she have an income. She talks in the present tense, your Honor, quote, that it's difficult, quote, not knowing when is the next job going to come along. It's frustrating to keep trying and not getting anywhere. She says, it is frustrating.

Well, no. Maybe it was frustrating, your Honor. But in fact when she gave that testimony, she knew full well that she was starting a new job with Kraft just two business days after that. Her testimony, your Honor, was crafted, it was calculated, it was set up precisely to mislead OMD about where she stood, about the fact that she had a new job.

That, your Honor, is the context in which she then

testified about her interviews, where she mentioned Kraft and she mentioned Universal McCann. Then she is asked, do you have any second interviews? Well, with a few of them, she says, either I didn't hear back or I didn't get the job. That testimony, your Honor, is blatantly false and intentionally false. No matter how she spins it, there is no way to that around that.

What she tries to say is, well, I didn't have two interviews with Kraft. Even if we accept the premise, the underlying premise, that somehow her answer only related to those companies with which she had two interviews, and I don't think that is a premise that is actually accurate, but even if we accepted that premise, she had an initial interview at Kraft with the individual who ultimately gave her a job.

She then sends an email to HR and says hey, thanks for expediting my interview process. She meets for a half hour with a brand manager in a conference room in Tarrytown, New York, with an individual who has her résumé, talks about her job responsibilities and what she is going to do in the future. You can call that whatever you want, but it's an interview, and she knew it was an interview, because she sends another note the next day, and the note the next day said, hey, thanks again for expediting the interview process.

Finally, after two of those interviews, she gets a job with Kraft. So this testimony that she didn't get the job was

false.

Even beyond Kraft, we turn to Universal McCann UM. There is no dispute, no deputy at all, that prior to the date when she was deposed she interviewed with Universal McCann at least six times. It's not in dispute. So when she said, I didn't get job, that is a false statement.

How does she try to explain that? She comes in a second day a federal court deposition, and she says, well, when I said that I didn't get the job, what I really meant was that although I got it and I accepted it, I didn't ultimately start that job. She says that's what she meant. Your Honor, it's inherently incredible and it's somewhat shocking that an individual would make such a statement in a court of law, in federal court, in a case where sanctions are an issue.

Secondly on the topic of UM, the notion that this was some sort of mistake, some sort of miswording, she testified on the second day of her deposition that she understood perfectly well the importance of information about her new job. She knew if she told OMD about her new job, it would cut off her damages. She knew it was an important factor in her case. She knew it was material. So to try to suggest that when she said "I didn't get the job" what she meant was anything other than that is simply an after-the-fact contrivance, false testimony.

It would be bad enough if that were the only issue here, but it goes well beyond that. The second point here is

that they never produced any documents. They never produced any documents about the fact that she had gotten the job. They never told us that she had gotten the job.

Now, in their opposition papers, your Honor, they come to this Court and they say, I'm sorry, perhaps there was a little law office failure, we didn't keep track of bringing the documents in as carefully as we could, we're going to fix our procedures and make it better. Your Honor, that's a lot of nonsense.

These are not real estate lawyers who took on an employment case just for the fun of it. Mr. Gilly and Mr. Filosa are very experienced employment lawyers. They know full well that information about a person getting a new job is the most critical piece of information that any defense lawyer could possibly want to know during discovery in an employment discrimination case.

When they showed up at that deposition and they hadn't produced any documents and she then testified, that was not a mistake. That wasn't law office failure. It was a conscious choice. And we know that it's a conscious choice. In addition to the fact itself, if you look at her testimony, Ms. Fryer very clearly gave misleading testimony that she was prepared to at minimum avoid as best as she could testifying about the fact that she had gotten a new job.

Even if we stop for a second, well, maybe Filosa and

Mr. Gilly forgot to produce the documents, forgot to tell you about the fact that she had gotten the new job before the date of her deposition, surely Mr. Filosa, when he was sitting there listening to her testimony, at minimum must have realized that this was extremely misleading testimony, at minimum, whether she had gotten a new job.

And this misleading testimony was exacerbated by fact that he never corrected it, and it was exacerbated by the fact had that neither he nor Ms. Fryer ever produced any documents. You put all of that together, it's pretty clear what's going on here.

Even if we take I one step farther and say maybe it just slipped his mind and he wasn't paying attention, he had a conversation with me, and he doesn't dispute it, where I flat-out said, hey, I hope she finds another job, litigation aside. There was dead silence. Not a word was said about the fact that she was starting a new job with a new employer just two days after that.

So when they come in here and try to say hey, we're correcting things, we're going to make things better by improving our office procedures, that's not trying to take responsibility for their actions, your Honor; it's avoiding responsibility for their actions.

And that's not all. Even before that, your Honor, they served an expert report 17 days after the date on which

she first got a job offer. Ten days after she accepted a job with Kraft, we received an expert report. The expert has no reference to Kraft, has no reference to Universal McCann. Not only that, it contains a damages analysis that says that her likely damages are going to be somewhere from $350,000 to over a million dollars.

Your Honor, that report was false and misleading on the day that it was served. Any lawyer who picked up that report, would have read that report and considered it to be tantamount to a representation by counsel and by Ms. Fryer herself that she had not obtained a new job, that she wasn't about to start a new job.

The response to that we get is, well, that's not true, it's not a false report, and the reason it's not false is that there was no guarantee that she would start a job with Kraft, and experts all the time make presumptions and assumptions, that's how they do their work. That's nonsense, your Honor.

Yes, it is true there was no guarantee she would start her job with Kraft. She may get fired from her job with Kraft tomorrow. But what experts do is they do their reports based on assumptions and probabilities. There is not an expert anywhere in the world who would have said that she has $350,000 to a million dollars in anticipated damages knowing full well that she had gotten a job with Kraft, no fly-by-night operation, and was just about to start a new job.

THE COURT: How much money did the defendants spend preparing a rebuttal report?

MR. COHEN: The amount that was spent on the rebuttal report itself, your Honor, I believe on the expert was somewhere from 7 to $10,000. I don't know what the amount was that was spent in attorney's fees. I only know the amount that we received on an invoice, your Honor.

The separate excuse they have given is, well, there was a deadline coming for the expert report and we wanted to meet that deadline. Even if that were so, even if it were somehow the case that they were concerned about meeting the deadline, it would have been a very simple matter to say, hey, we got this expert report in, we had to meet the deadline, we didn't want to call the Court and ask for another extension, but we are going to have to revise this, we are going to have to give you a renewed report.

They could have done that the next day. They could have done it the following day. They could have done it any day right up to the day on which we contacted them, but they did not do so.

Why didn't they do so? Because what they actually did the very next day was the exact opposite of that. What they did was instead they sent a document to us, a letter, in which they said, hey, our settlement proposal is perfectly reasonable. Look, it's on the low end of the economic damages

of this report that we just sent to you. They knew that that information was false and misleading, and they used it as a basis to try to shake OMD up, to get OMD thinking about economic damages when settlement discussions were going on.

In their opposition brief, your Honor, they even, quite surprisingly, acknowledge this. They actually said that, they referred to the expert report in order to support the reasonableness of their settlement demand and they write, "and to shake defendants from their repeated mischaracterization of plaintiff's settlement position." That is tantamount to acknowledging that they fraudulently induced OMD to make settlement demands.

The record, as actually laid out by them in their opposition brief, shows that it worked like a charm. From the beginning of this case until the middle of September, your Honor, OMD never responded. Their settlement demand was always $350,000, and OMD never responded to it once. September 27th they provide the false report. September 28th they send a letter about the false report. Over the course of the next two weeks they don't produce any documents, they don't tell us that she had gotten this new job.

On October 7th she testifies falsely at her deposition. That testimony is never corrected. October 11th is her first day, unknown to OMD, on her new job. Lo and behold, your Honor, on October 12th, after all of these steps,

after all of these actions, on October 12th is when settlement discussions start.

Of course, OMD was relying on the information that was provided to it in good faith or we believed in good faith by the other side. Over the course of the next eight days, through the 20th, there were ongoing settlement negotiations that ultimately were conducted in bad faith because information as I have just laid out for you was very clearly and very obviously withheld.

Do we know whether they ultimately would have provided the documents, would have disclosed this information? They haven't given any information that would show that. They haven't given any information that would suggest that. But at the end of the day what is very clear is that they withheld this information intentionally with the absolute clear intent of misleading OMD in an effort to get a settlement that OMD would have thought would have been unreasonable.

Your Honor, I've litigated against this firm before. I have litigated with Mr. Thompson. They are tough lawyers. They are smart lawyers. They said in their opposition papers that they are lawyers that have worked hard on their reputation for integrity. I actually don't dispute that. Frankly, that's what makes it a little bit more difficult. The fact of the matter is that neither I nor I believe anyone in my office that worked on this case would ever have believed or ever have

suspected that we had been duped, that we had been faked out, and that is precisely what happened.

The question, then, is what is the appropriate remedy in this case? We submit to the Court that the only proper and appropriate remedy is dismissal of this case along with monetary sanctions.

As an initial matter, they have argued that even if everything we said was true, it somehow is not as serious, not as bad a wrong as the various other cases in which individuals have had their cases thrown out with prejudice. They are simply wrong.

I don't mean to get up on a soapbox here, your Honor, but the functioning of our judicial system counts on honesty. It relies on honesty in depositions, honesty in document production, honesty in expert disclosures. It relies on fundamental fairness between parties in their interactions, particularly when it regards settlement.

I don't know how often this type of behavior occurs. I can't say. I'm sure its quite rare that it comes before the Court. But at the end of the day, when you have a plaintiff and their lawyers who all know, who very clearly have worked together in a multifaceted bad faith attempt to provide misleading information in order to improve their settlement position, we submit to the Court that that is as serious as or more serious than any of the cases in which dismissal has been

ordered.

In addition, when these cases are analyzed by courts, when the decision is made as to whether dismissal is the appropriate remedy under the circumstances, courts frequently ask the question, well, is this likely to recur and have the individuals who are responsible taken responsibility for their actions? There have been cases where there has been clear perjury and the court has said, you know what, I'm going to award attorney's fees but they have accepted responsibility for their actions and I'm not going to dismiss the case.

That's not what happened here. Ms. Fryer testified falsely once. Do we expect that behavior to recur? We know it's going to recur, because it already has. She testified falsely at her deposition and she testified falsely again when she tried to weasel out of her prior testimony. Has she taken responsibility for her actions? Certainly not. She denies any wrongdoing to this day.

That addresses Ms. Fryer.

Then we have to turn to Ms. Fryer's lawyers. I have to say, as I said to the Court last time we were here, I had no desire to bring this motion, I get no joy out of bringing this motion. But the simple fact is that to this day the lawyers in this case have not taken any responsibility.

To this day they don't acknowledge that this information was withheld in an effort to get an advantage in

settlement discussions. They don't acknowledge that there was anything wrong with that expert report. To this day they say it's fine. They say that there was nothing wrong with not having corrected her false deposition testimony.

The only thing that they concede is, well, we have put in place slightly better office procedures, which in and of itself ignores the fact that this is several things together that show an intentional plan to try to get a leg up in settlement discussions.

At some level it's beyond this. Not only did they defend these actions, not only did they refuse to acknowledge any wrongdoing, but they treated this as just another litigation matter in which they can just be aggressive tough-guy lawyers. When I brought this information to their attention and said, hey, look, you've got a problem here, what's going on, how could this have happened, how could I have been misled, what was their response?

Not only did they say, hey, we didn't do anything wrong, we didn't do anything vaguely wrong; on top of that, it doesn't affect our settlement position a penny because we think this is frivolous. They even went so far as to say that if we brought this motion based on the information that we have brought to the Court's attention, the very same information, they would seek sanctions not only against me and against OMD if we had the chutzpah to bring this misconduct to the Court's

attention.

I think that if the Court were to look at the entire history of how this developed, how all of this played out, it becomes very apparent that this was a litigation tactic, like any other litigation tactic. Well, it didn't work out, so they are ready to move on to the next step in the poker game.

That response to this motion, your Honor, hasn't been the response of lawyers who felt an obligation to provide every piece of information to the Court. No. It seems to me they treated it like any other motion in which a lawyer zealously advocates on behalf of their client. They didn't provide all the information. They have left out pieces of information. There are any number of items that are laid out in their papers that ultimately are misleading to the Court.

Yes, after we saw the Court the last time, it was obvious, apparently, to the plaintiffs that they had to do something a little bit differently, so they begrudgingly acknowledged that perhaps the tide has changed slightly. But ultimately it's clear that their view is, hey, this is just cutting into our profit margin. Good show, well done, you've shown us, so our profit margin is a little less and we may end up settling the case for a little less than we otherwise would have settled for.

We submit to the Court that that is improper, that that's wrong, and that the message that has to be sent here is

that when you break the rules, when you abuse the process, you don't get to break the rules and start again, you don't get to pass go and collect whatever it is that you could otherwise collect. This was improper conduct.

In our view, the only proper remedy, the only remedy that will get the proper message across to Ms. Fryer for her testimony, to her lawyers, and frankly to anyone else out there who would abuse the system in this way, in a way that, as I said, is very rarely before the court, the only properly remedial measure under those circumstances, your Honor, is dismissal of the case.

THE COURT: Thank you, Mr. Cohen.

Mr. Thompson.

MR. THOMPSON: Thank you, your Honor. Your Honor, it is very important at the outset for me to advise the Court that we made mistakes at my law firm. We should have gathered those job-related documents, all of them, from the client promptly and supplemented our document production promptly. We should have turned over those job-related documents before Ms. Fryer's deposition was taken on October 7, 2010. We should not have sent the expert report to the defendants. We should have also told the defendants that the expert report was going to be revised in a couple of weeks.

But those mistakes were mistakes, not acts of misconduct. The young lawyer who handled the case Mr. Cohen

has referred to, Greg Filosa, he believed that there was no urgency in getting the documents quickly to the other side because he felt that the issue of Ms. Fryer's new job was going to come up at her deposition and that he would give the documents over. We had already produced documents relating her efforts to mitigate her damages.

In addition, Mr. Filosa believed, erroneously, that it was better for him to meet a deadline to produce the expert report rather than seek an extension of that deadline. What happened is he had already gotten an extension of the deadline to produce the expert report, and when September 27th came around, his thinking was I'll produce the report rather than seek another extension and we will revise the report when two things happen.

One is Ms. Fryer was scheduled to begin her new job on October 11, 2010. Weeks earlier, Mr. Filosa believed that he wanted to make sure she in fact had started that job. He also wanted to get a pay stub from that job to give to the expert that we had retained so he could get the report revised.

Now, it may seem completely ridiculous for a lawyer at our firm to think, oh, I'm going to wait to see if our client actually starts working. But, your Honor, it is a fact that at my firm we had a case, Paulina DeMarco v. Stony Brook Research, where our client was fired from her job because of discrimination, filed a lawsuit, and found a new job, was given

a date to start that job. When the new job found out about her lawsuit, days before she was supposed to start that new job, they revoked the offer.

Greg Filosa was the associate on that particular case, so he remembered what happened to Paulina DeMarco, and he thought, I want to make sure that Violet Fryer actually starts her job and doesn't get the job taken away like Paulina DeMarco did a couple of years ago.

THE COURT: When did your partner Mr. Gilly know that Ms. Fryer was starting a new job?

MR. THOMPSON: Your Honor, it is my understanding that Mr. Gilly knew that Ms. Fryer was starting a new job at the time that we sent the report, that Greg Filosa had advised him that she had this job offer and that she had accepted it.

THE COURT: Did Mr. Gilly review the expert report at that time?

MR. THOMPSON: He did not, your Honor. He did not. But, your Honor, there is something else important in terms of giving the Court context in terms of what happened here. When this all occurred --

THE COURT: Wait. You're telling me that Mr. Gilly didn't review the expert report before it was sent to his adversary?

MR. THOMPSON: Yes. I want to explain what happened, your Honor. In September the partner who was handling this

case had left the firm, shortly before that. Andrew Goodstadt was the partner who had handled this case from the moment we took it in as a law firm.

When Andrew Goodstadt, a partner at Thompson Wigdor and Gilly, left the firm, we had all, the three partners -- myself, Mr. Gilly, and Doug Wigdor -- divided Mr. Goodstadt's assignments. It was a transition. It doesn't excuse what happened. But in September of 2010 was a period of transition at the firm. There should have been stronger, pardon the oversight, obviously.

Your Honor, what is important to keep in mind is what opposing counsel is seeking to do here is to make mistakes that we have made and that we concede and turn them into some sort of nefarious plot to suggest that our law firm would abuse the judicial process. In his papers he says, quote, that we engaged in an unconscionable scheme calculated to enhance Fryer's damages. There is no evidence, clear and convincing or otherwise, because that never happened.

THE COURT: Why would Mr. Filosa make settlement demands on the basis of an expert report that he knew was false?

MR. THOMPSON: Your Honor, what's interesting about what opposing counsel said today, he said something very interesting that is false. He said their settlement demand was always 350,000. Your Honor, Mr. Cohen knows that that is

simply not true.

Before we ever filed a lawsuit in this courthouse, we made a demand of 350,000 and we reduced that demand to 250,000 to the in-house counsel, when who is sitting right here today. So we went from 350,000 before we ever filed the lawsuit, down to 250,000, which ways based on her back pay, her attorney's fees, and her costs to date.

When Mr. Filosa, who had not dealt with Mr. Cohen until the date of the deposition and afterwards, spoke to Mr. Cohen about our demand, he maintained it was 350. Mr. Cohen put more money on the table, and Greg Filosa came down to 250,000.

What they are trying to convince the Court of is that we used this expert report to somehow extract an exorbitant settlement demand for Ms. Fryer. That's not what happened.

THE COURT: Isn't it true that once you knew that she had a job, her damages were capped well below that number?

MR. THOMPSON: Your Honor, it is true --

THE COURT: Isn't it?

MR. THOMPSON: Yes, it is true that if Ms. Fryer took that job and actually got earnings. The revised report shows that her damages were less than what was reflected in the report that we sent.

Now, Greg Filosa had spoken to Mr. Cohen's associate in terms of trying to settle the case. We did not repeatedly

use that expert report to try to get 350,000. Does opposing counsel really believe that the partners at my firm would throw away all the hard work we put into building our firm, jeopardize the livelihood of our families and our employees, damage our good name, simply to give Violet Fryer 350,000 or 250,000 for OMD? That doesn't make sense.

What happened here, your Honor, what opposing counsel is trying to do -- and I understand his strategy. His strategy is to say Fryer committed perjury, Thompson Wigdor and Gilly were in collusion with her, and therefore this is such misconduct that the Court must dismiss her complaint and must impose sanctions.

First of all, your Honor, and this is a fact, in their papers they state, quote, "During October 7, 2010 deposition Fryer falsely testified that she did not get a job with the companies with which she had interviews, including Kraft and UM."

It is a fact that during her deposition on October 7, 2010, they never asked her whether she received or accepted an offer of employment from any employer. In fact, Mr. Cohen, who took that deposition, specifically asked her:

"Q. Have you worked since you left OMD?

"A. No."

Then he asked her about companies that she had second interviews at. He says, oh, it wasn't really about the second

interviews. It was. His question specifically to her during the first day of deposition was, quote, and this is on page 256 of the first day of deposition, line 16:

"And have you had second interviews with any companies?

"A. With a few of them." Then she volunteered this. "And after I, I didn't, either I didn't hear back or I didn't get the job."

What is clear is that --

THE COURT: Isn't that untruthful testimony, "I didn't get the job"?

MR. THOMPSON: Yes. Your Honor, there were two jobs that Ms. Fryer had offers from. One was Kraft, where she is working today, Kraft Foods. The question was whether she had two interviews at any of the companies. That's what he asked her. She answered with respect to Kraft. The answer was no with respect to Kraft because she had one interview with that company.

She went back to meet a colleague to find out more about the job that she was going to be doing. When we interview a number of people, associates, at our firm, we give an offer, and we have them come back to meet our junior associates so they can know exactly what they are going to be doing, who they will be working with. That's what happened at Kraft. So she didn't commit perjury with respect to her answer

on Kraft.

The other company, UM, it's a fact she interviewed at that company about five times.

THE COURT: And she got the job.

MR. THOMPSON: She got the job. But what she explained, your Honor, and this is important, is that in her second day of deposition Mr. Cohen spent a lot of time, and I would have done the same thing, asking her what she thought when she said, either I didn't hear from them or I didn't get the job with respect to UM. This is what she said. She believed, your Honor, when she said, I didn't get the job, what she meant was she did not end up working at the job.

THE COURT: Am I really supposed to accept that explanation as credible?

MR. THOMPSON: What she explained, your Honor, when she made that comment, it was off the cuff. But I want to direct your attention to something that she said that I do believe is credible. Mr. Cohen asked her during her second day of deposition, page 179 at line 12:

"Q. And is it your testimony as you sit here today under oath that at no point were you trying to avoid telling OMD and its attorneys that you had received a job from Kraft?

"A. Absolutely not. There was absolutely no point in doing that, no reason. I came in here to tell the truth and I did the best I could to the questions. I never ever in a million

years thought I would walk out of here that day without you knowing that I had a job and that I would be starting. And I was planning on taking one of those jobs the following day -- taking one on the following day because you would obviously find out."

THE COURT: But she did walk out of the deposition knowing that two days later she was starting a job that she had already accepted and Mr. Filosa let her walk out of that deposition leaving that impression.

MR. THOMPSON: There were two things, your Honor. One is Mr. Cohen never asked her, and he admitted later he never asked her, questions regarding whether she had received any job offers. He never asked her that. She also ended that first day of deposition early because she had childcare obligations, which we understood.

THE COURT: What does that have to do with anything?

MR. THOMPSON: What it has to do with, your Honor, is the fact that our client and the lawyer who was defending her at that deposition believed that she was going to be asked questions about her job offers. She was not asked those questions. The deposition ended early. Mr. Cohen was coming back. And when she had her second day of deposition she, told the truth.

This was not an effort to hide the facts. In order for the Court to find that we engaged in misconduct, the Court

would have to believe that we actually sat there, first of all, that we engaged in this conspiracy with our client to lie about a critical fact when the whole world would see her walking into Kraft Food Company a couple of days later and that we would not be able to hide this fact.

At the end of the day, your Honor -- this is important -- we tried to settle this case like we settle all cases. It wasn't that we needed this expert report. Most of the cases I settle, Scott Gilly settles, Doug Wigdor settles, we don't have an expert report. So it wasn't that we needed this expert report. We told them from day one 350 is our starting demand but we would come down to 250. And when we filed the case, we still maintained that.

Was it a mistake for Mr. Filosa to refer to the expert report in his letter? Yes, it was. But it wasn't part of this overall plan where we coached our client to go in there and hide this fact that no one could hide.

THE COURT: Did Mr. Filosa discuss his letter with Mr. Gilly before he sent it?

MR. THOMPSON: He did not, your Honor, he did not.

THE COURT: When did Mr. Gilly review the expert report?

MR. GILLY: May I respond, your Honor?

MR. THOMPSON: I'll have him respond.

THE COURT: Certainly.

MR. GILLY: Your Honor, I appreciate that. Since this issue has come up following Ms. Fryer's deposition, I've spent a great deal of time reviewing the matter with Mr. Filosa, discussing what had happened that led to the situation that we are facing today, your Honor. My best recollection is I did not review the expert report until after Mr. Cohen brought these issues to the attention of our firm in his initial letter to Mr. Filosa about this matter.

I don't offer it as an excuse for anything that may have been a shortcoming in terms of oversight of this case, but I will concede, your Honor, that in September of 2010 there were a number of matters that I was tasked with taking the lead on transitioning from Mr. Goodstadt's oversight. This is one that I did not oversee in the fashion that I usually would oversee a case. I concede that. It troubles me quite a bit.

THE COURT: Were you aware that Filosa had not disclosed Fryer's job to defense counsel?

MR. GILLY: Your Honor, I was not aware of that fact until it was brought to our attention by Mr. Cohen. I, again regrettably, was not aware of that. As I said, since this has come up, it's troubled me a great deal because I have always believed myself to be a lawyer who practices, putting aside allegations of misconduct or sanctionable conduct, who practices law in a manner that is above reproach. I believe that is the reputation I have. That's what I have always

thought I have done in my career. It bothers me a great deal that we did not meet that standard and I did not meet that standard on this case.

I do want the Court to know that at no time did I engage in nor do I believe Mr. Filosa engaged in the conduct that has been asserted against us here. We did fall short in a number of areas. We did make the mistakes that have been pointed out. There is really no excuse for them. They happened. I can't change that. But I do want to take this moment to explain to the Court that at no time was this done in an intentional way to try to mislead anyone.

MR. THOMPSON: Your Honor, if I may make a couple of more comments? Then I'll sit down. Your Honor, what opposing counsel is asking is that the Court impose a drastic sanction here, the sanction of dismissal, which will bring an end to this case. Violet Fryer deserves to have her case decided on the merits.

These mistakes that were made were not intentional. They were not part of any type of unconscionable scheme. Ultimately, we would respectfully request that she be allowed to present her case, because if they did not discriminate against her in connection with her pregnancy, certainly a jury will reach that conclusion.

In addition, your Honor, with respect to our law firm, we have looked at all the cases they have cited. One of the

comments in their papers that jumped out at me was when they said that our, quote, bad faith subversion of the judicial process is as serious as, if not more serious than, any other dismissal case that is they cited in their moving papers.

Your Honor, we have read your case in Shangold involving the treatment and the Palm Pilot and what you said and what you did in that case. We read the McMunn case that was before Judge Buchwald. We looked at the case Judge Patterson had in Mackel.

At the end of the day, those particular plaintiffs literally lied, cheated, and tried to steal their way through discovery, altered tapes, tried to hide material witnesses, telling other people they are going to commit perjury, a treatment that they said they wrote at a certain point where they referenced Palm Pilot when the term "Palm Pilot" wasn't even in existence. That's not what happened here.

We would ask, if you look at all the factors that courts are asked to consider when determining whether sanctions should be imposed, your Honor, those factors weigh in favor of not imposing sanctions.

Now, opposing counsel is not going to believe that we have taken steps at TWG to make sure this never happens again, but we have. We have told every lawyer, whether they are straight out of law school or ten years practicing, that they must, when they get an expert report and they learn that our

client got a job, whether they start the job or not, despite what happened to Paulina DeMarco, they must revise that report, withhold that report, ask the Court for permission to get another extension if necessary, because there would be good cause to do so. So we'll never have this happen again.

Scott Gilly said it better than I could ever say it. At the end of the day, we are all lawyers of integrity. This is something that pains us because here we are in open court having to admit to mistakes that we have made under the pressure of sanctions.

And they have used the threat of sanctions very skillfully here. When Mr. Gilly came before you in January, and Mr. Cohen, you told them why don't you guys try to resolve this before you file any motions. Scott Gilly in good faith reached out to Mr. Cohen to see if we could settle this case. They can't deny that Violet Fryer is definitely out of pocket some money. She was out of work from June 2009 until October 2010.

Mr. Gilly reached out to Mr. Cohen. Mr. Cohen told him, we have a settlement offer, OMD will give you this offer. Drop this case with prejudice. You don't get a dime and we won't file any sanctions, we won't seek any sanctions against you. And he said, you've got to let us know within 24 hours whether you accept that.

Your Honor, I've been practicing for a long time. I

don't think I've ever given opposing counsel 24 hours to get back to me on any settlement demand, let alone a settlement demand like that.

At the end of the day, what we would ask, your Honor, is that the Court look at the entire circumstances here. When Violet Fryer testified the second day and explained her position, whether Mr. Cohen believed her or not, he should not have stood up and said that was quite a performance, like he did. And in his reply papers he tells us that by continuing in this case, we run the criminal risk of going forward with this case.

Your Honor, we did not engage in misconduct. We stand by that. We made mistakes. We would respectfully request that you take that into account in reaching your decision.

Thank you.

MR. COHEN: May I make a few brief comments, your Honor?

THE COURT: Briefly.

MR. COHEN: The brief comments are these. The one thing that I do regret in retrospect was that when I deposed Ms. Fryer I made sure there was not a single loose end available, that there was no wiggle room for her to tell another story. I was never going to be able to get the communications between Mr. Filosa and Ms. Fryer.

But it was my expectations, and perhaps I was still

being naive in assuming that Mr. Gilly and Mr. Filosa were going to provide the Court with their own complete and full accounting of everything that occurred so that I would not have had to have taken their depositions and gotten all of the details. As a result of that, the Court was left to ask some questions, and there are some questions left hanging out there.

I would suggest to the Court that although certainly Mr. Filosa is the primary person responsible for what's happened here, the notion, the effort to sort of throw him under the bus is disingenuous at best here. There was never a full accounting provided at all. If you go back and look at the declarations, you can see they are providing information that they think is useful as opposed to the information that they should have fully and completely provided to the Court.

The second point I want to make is there is no point in having a debate over who is reasonable or who isn't reasonable. I would say without any uncertainty you don't go to Thompson Wigdor with a starting position that is anything but tough, because that is the way that they are going to operate.

At the end of the day, Mr. Gilly told me, I want a hundred thousand dollars or the case is not going to settle. Fair enough. That's his position. I'm OK with that. We weren't going to do that. It's not for anyone to say who is reasonable, who is not, but that's where the case was left.

Finally, I want to point out that both Mr. Gilly and Mr. Thompson are excellent lawyers. Mr. Thompson was not going to come into this courtroom and show you anything other than contrition, attempt to show you that they have made mistakes, attempt to show you that they have done things wrong and they are going to change it.

I would encourage you to go back and look through the record of this case. Look through the record of the case in October of 2010, when I guarantee you Mr. Gilly was the person signing off on Mr. Filosa's letters. Let's see how contrite they are then when they write a letter back to me and say we are not touching our settlement demand or we are going to bring sanctions against you. Every step of the way they take a step back and a step back and a step back because they forced us to come forward and push this to this point.

I would submit to the Court that at this point it's to a little and too late. If the Court goes over the progression of events and what's happened here, that is far more critical and far more important than Mr. Thompson's and Mr. Gilly's very well spoken statements. I would have expected nothing less of them today.

I'd rather look back to the earlier times when they looked at this case and said, hey, you're not so tough over there, we're going to cross-examine her at trial if you don't like it, pal. That's what happened back at the end of 2010.

That's what happened every single day until the day that we walked into your robing room to discuss the pretrial, to discuss our requests to make this motion. I would submit that those are the factors more important than any statements that Mr. Gilly or Mr. Thompson made here today.

THE COURT: We are going to take a five-minute recess.

(Recess)

THE COURT: Before this Court is defendant's motion for sanctions based on allegations that Ms. Fryer and her counsel, Thompson Wigdor and Gilly LLP, intentionally misled the defendants and their counsel about Ms. Fryer's potential damages and new employment.

A court "has the inherent power to do whatever is reasonably necessary to deter abuse of the judicial process and ensure a level playing field for all litigants." Shangold v. Walt Disney Co., 03 Civ. 9522 (WHP), 2006 WL 71672 at *4 (S.D.N.Y. January 12, 2006); see also Residential Funding Corp. v. DeGeorge Financial Corp., 306 F.3d 99, 107 (2d Cir. 2002).

The Second Circuit generally requires "a finding of bad faith for the imposition of sanctions under the inherent power doctrine. That bad faith must be shown by (1) clear evidence or (2) harassment or delay or other improper purposes." DLC Management Corp. v. The Town of Hyde Park, 163 F.3d 124, 136 (2d Cir. 1998).

Whether dismissal is appropriate as a sanction is

within the discretion of the district court. See Dodson v. Runyon, 86 F.3d 37, 39 (2d Cir. 1996). "The Second Circuit, however, has long recognized that dismissal is a harsh remedy not to be utilized without a careful weighing of its appropriateness and repeatedly noted that one of the factors that should inform a trial court's decision is the suitability of lesser sanctions." Shangold, 2006 WL 71672 at *4 (citations omitted).

In this case there is clear evidence that Ms. Fryer and her attorneys attempted to conceal the fact that she had been offered and had accepted new employment. By September 27, 2010, Ms. Fryer had been offered a job at Universal McCann; had accepted the Universal McCann position; had rescinded that acceptance; had then been offered a job at Kraft; and had accepted the Kraft position.

Yet at her October 7, 2010 deposition, nearly two weeks later, when asked about second interviews with any companies in the previous months, Ms. Fryer testified that either she "didn't hear back" or she "didn't get the job." That testimony was false. It is also highly misleading, because it is clear from the tenor of the deposition and the questioner's earlier inquiries that he was interested in whether Ms. Fryer had obtained new employment. Ms. Fryer's explanation that when she said she "didn't get the job" she meant that "she didn't end up with the job" is preposterous.

As to the conduct of Ms. Fryer's counsel, Thompson Wigdor and Gilly, on September 27, 2010, the firm served an expert report estimating Ms. Fryer's past and future losses as between 350,000 and $1 million based on the assumption that she was unemployed. Since Ms. Fryer had accepted the position at Kraft on September 26th, those estimates were inaccurate on the day the report was served. Nevertheless, Thompson Wigdor neither disclosed that Ms. Fryer had accepted the Kraft position nor provided documentation concerning her other interviews or the Universal McCann position despite having had numerous opportunities to do so.

For example, Thompson Wigdor could have disclosed this information (1) on October 5, 2010, when it provided Davis and Gilbert with the documentation underlying the expert report, (2) on October 7th, during Ms. Fryer's deposition, or (3) at any time during couple's regular settlement discussions between October 12th and October 20th.

Under these circumstances, it appears that Thompson Wigdor's conduct concealed Ms. Fryer's new employment and leveraged the false expert report in order to extract a favorable settlement amount. Indeed, during settlement negotiations Ms. Fryer's counsel Mr. Filosa represented that her settlement demand was reasonable because it was at the bottom end of the false damages estimate.

Moreover, Thompson Wigdor's argument that it acted in

good faith is belied by the fact that rather than disclosing Ms. Fryer's new employment, it waited until defendant's counsel discovered that information on its own.

And, perhaps most importantly, as an officer of the court, Mr. Filosa should have recognized that Ms. Fryer's deposition testimony would mislead defendant's counsel into believing that she had not obtained new employment. That became perfectly clear to this Court when I reviewed Ms. Fryer's video deposition. The words are in the transcript. The body language and evasion is on the videotape. It's shocking and deeply disappointing to this Court.

Accordingly, this Court finds that sanctions are appropriate. However, this Court declines to impose the sanction of dismissal. While defendant has suffered some prejudice, the primary harm resulting from Ms. Fryer's and Thompson Wigdor's conduct is to the judicial process itself.

Under the circumstances, this Court finds that a sanction of $2500 against Ms. Fryer and $15,000 against Thompson Wigdor appropriate. I am going to require those payments to be made to the Davis & Gilbert firm to reimburse them in part in connection with this matter. Barring a showing of hardship on Ms. Fryer's part, I'm going to require those payments to be made within 45 days.

I will enter a very short order on the docket reflecting this ruling. This constitutes the decision of this

Court.

Anything further?

MR. THOMPSON: No, your Honor.

MR. COHEN: No, your Honor.

THE COURT: This matter is concluded.

(Adjourned)